

March 18, 2013

David M. Fleishman
Hanley & Fleishman, LLP
8930 Morro Road
Atascadero, CA 93422

Re: Your Request for Advice
Our File No. A-12-178

Dear Mr. Fleishman:

This letter responds to your request for advice on behalf of Guadalupe Mayor Frances Romero regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ This letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Also, please note that the Commission does not provide advice on bodies of law outside the confines of the Act. Thus, we offer no opinion on the application of other laws that may apply including, but not limited to the doctrine of incompatible activities and Government Code Section 1090.

QUESTION

Does Mayor Romero's supervision of subdivision map preparation at the planning firm fall under the exception in Regulation 18702.4(b)(4) for drawings or submissions of an architectural, engineering or similar nature?

CONCLUSION

Based on the facts you provided, Mayor Romero has a conflict of interest with regard to a land use development project that is likely to come before the city council and she will recuse herself from voting on the project to avoid a conflict of interest. However, based on the applicable exception in Regulation 18702.4(b)(4), Mayor Romero's supervision of subdivision map preparations will not be considered prohibited influencing of the decision within the meaning of the Political Reform Act.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

FACTS

Your office is the City Attorney for the City of Guadalupe. Frances Romero is the mayor of the City of Guadalupe. Mayor Romero is also a senior-level planner at a local planning firm. Mayor Romero is supervising the junior planners on a land use development project. This project is likely to come to the city council at some point for discretionary review and approval. Mayor Romero anticipates recusing herself from the decision on the development project. You are requesting information regarding whether or not Mayor Romero may continue to supervise the junior planners on the development project as part of her regular employee duties in her private capacity.

In addition, you provided the following additional facts in our telephone conversation. First, a 220 acre development project was approved by the city council before the mayor was elected. The development project includes 800 residential units, a commercial area, and a 17-acre school site. Secondly, in her private capacity as supervisor, Mayor Romero will oversee subdivision map preparation of this 200 acre development project by a few of the junior planners at the planning firm. Lastly, the subdivision maps will be rolled out in phases for approval by the city council. Phase 1 includes mapping for approximately 350 homes and street locations. There is no detailed construction information on these maps.

ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Specifically, Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. The Commission has adopted a standard eight-step analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision. (Regulation 18700(b)(1)-(8).)

Step 1 of the conflict-of-interest standard analysis requires the commission to determine whether the individual is a public official, within the meaning of the act. (Regulation 18700(b)(1).) As mayor of Guadalupe, Ms. Romero is a public official. (Section 82048.)

Under Step two of the Act, a conflict of interest only arises if the public official will be making, participating in making, or using or attempting to use his or her official position to influence a government decision. (Regulation 18700(b)(2).) If the public official is not making, participating in making, or using or attempting to use his or her official position to influence a government decision then there is no conflict of interest. In other words, under the Act's conflict-of-interest provisions an official is not prohibited from supervising subordinate employees on a private project if the official is not making, participating in making, or influencing a governmental decision. The Commission has adopted a series of regulations

defining “making,” “participating in making,” and “using official position to influence” a governmental decision. (Regulations 18702-18702.3)

Under the facts presented, Mayor Romero intends to recuse herself from involvement in any official decisions by the city council in regard to this land use development project. Presumably, then, she will be neither “making,” as defined in Regulation 18702.1, nor “participating in making,” as defined in Regulation 18702.2, in any official decisions concerning the project.² The remaining issue, therefore, is whether, by acting in her private capacity to oversee the subdivision map preparation for the project by junior planners at the planning firm at which she is employed, the Mayor is using her official position to influence a governmental decision.

Determining when a public official is using or attempting to use his or her official position to influence a governmental decision varies on whether or not the governmental decision is within or before the official’s agency. When a governmental decision is within or before an official’s agency or an agency appointed by or subject to the budgetary control of his or her agency, the official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision the official contacts, or appears before, *or otherwise attempts to influence*, any member, officer, employee or consultant of the agency. Attempts to influence include, but are not limited to, appearances or contacts by the official on behalf of a business entity, client, or customer. (Regulation 18702.3(a).)³ Since the project is being considered by the city, the governmental decision is within or before Mayor Romero’s agency and this test will therefore apply to her.

Generally, the Act does not prohibit another member of the mayor’s firm from representing an applicant before the city council. However, your question asks whether directing or advising the work of an employee in the planning firm is, by itself, an “attempt” by Mayor Romero “to influence” the city’s decision on the project. Regulation 18702.4(b) provides several exceptions applicable to the question of whether an official is “attempting to influence” a governmental decision. Your letter and your staff specifically asked if planning documents, such as subdivision maps, would fall under Regulation 18702.4(b)(4). Under this exception, an official is not attempting to use his or her official position to influence a governmental decision

² Please note, if a public official has a conflict of interest in an agenda item noticed at a public meeting, then he or she must: (1) publicly identify the financial interest immediately prior to discussion of the item, as detailed in Regulation 18702.5(b); (2) recuse himself or herself from discussing, voting on, or otherwise influencing the matter; and (3) leave the room until after the discussion, vote, or conclusion of any other disposition of the matter. (Section 87105.) However, under Regulation 18702.5(d)(3), you may speak as a member of the public so long as you comply with the rules located in Regulation 18702.5(b)(1) and (b)(2).

³ For your information, Regulation 18702.3(b) provides that for a governmental decision within or before an agency other than the public official’s own agency, or an agency appointed by or subject to the budgetary control of the public official’s agency, the official is attempting to use his or her official position to influence the decisions if, for the purpose of influencing the decision, the official acts or purports to act on behalf of, or as the representative of, his or her agency to any member, officer, employee or consultant of an agency. As stated above, the governmental decision will be within or before Mayor Romero’s own agency and as such Regulation 18702.3(b) is not applicable.

of an agency if the official prepares drawings or submissions of an architectural, engineering or similar nature to be used by a client in connection with a proceeding before any agency. This provision applies only if the official has no other direct oral or written contact with the agency with regard to the client's proceeding before the agency, except for necessary contact with agency staff concerning the processing or evaluation of the drawings or submissions prepared by the official.

Mayor Romero will be supervising the preparation of subdivision maps to be presented to the city council. Neither of these two items fall explicitly under the exceptions. However, a subdivision plan is similar to an architectural drawing in the following respects:

(1) Both subdivision maps and building architectural or engineering plans must comply with a set of rules and procedures in order to be approved by a city council. Subdivision maps must comply with the State Subdivision Map Act. (Gov. Code, Section 66433.)

(2) Similarly, architectural plans and subdivision maps must include site plans that are drawn to scale so others can see and understand the overall site concept.

(3) Architectural drawings and subdivision maps provide slope analysis and elevations to ensure viewers have a better understanding of the scope and complexity of a project.

(4) Landscape plans are also necessary elements to both architectural drawings and subdivision maps. Landscaping is intended to achieve architectural enhancement and an attractive living environment. They show the viewer where any natural streams or waterways may run through and illustrate any natural confines the design must adhere to.

These similarities show the technical aspect of both subdivision maps and architectural drawings. Subdivision maps and architectural drawings both use technical specifications and define a space of land or structure of a building that is to be constructed. Even though a subdivision map does not have the detail of the construction and design aspect of each individual building, it has many similarities to an architectural drawing, indicating that a subdivision map and an architectural or engineering drawing should be treated the same.

Additionally, the history behind our regulatory exception tends to show that subdivision maps and architectural or engineering drawings should be treated similarly under our regulations. Information in the file for Regulation 18702.4 indicates that, historically, cities were concerned about Commission interpretations of the Act that placed limitations on the professional activities of planning commissioners or city councilmembers who were architects or engineers. In 1985 an ad hoc committee from the City Attorneys Department of the League of California Cities agreed that such architects and engineers should be able to prepare drawings and plans for clients, even though the drawings and plans would be submitted before the planning commission. The city attorneys thought the exception was necessary in order to allow local architects and engineers, who often are sole practitioners or work in small firms, to continue to practice their profession when they act as planning commissioners or councilmembers. Memorandum from Diane Fishburn to FPPC, Proposed Amendment to Regulation 18700.1, April 29, 1985.

On these specific facts, we conclude that the exception in Regulation 18702.4(b)(4) applies to the subdivision map and Mayor Romero does not have a conflict of interest in overseeing preparation of the subdivision map.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Caroline Bolton
Counsel, Legal Division

CB:vll